

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oldfield Garage Services Ltd.*
v. Woodland,
2003 BCSC 1295

Date: 20030821
Docket: 03/2602
Registry: Victoria

Between:

**Oldfield Garage Services Ltd. doing business as
Oldfield Garage Services/Save-on Gas**

Appellant

And:

**Laurie Woodland, Administrator, Tobacco Sales Act,
Ministry of Health Planning**

Respondent

Before: The Honourable Mr. Justice R.D. Wilson

Reasons for Judgment

Counsel for the Appellant: H. Wellman

Counsel for the Respondent: J.M. Loenen

Date and Place of Hearing: 20030805
Victoria, B.C.

I

[1] In the exercise of power conferred in s. 9 of the **Tobacco Tax Act**¹, the director of that Act suspended the appellant's authorization to sell tobacco products. The suspension is for a period of 24 months, commencing 24 June 2003. Pursuant to s. 10 of the **Tobacco Sales Act**², the appellant appeals that suspension.

II

[2] The material provisions of the two statutes, for the purposes of this appeal are as follows.

TOBACCO SALES ACT

[3] Section 1:

"administrator" means the administrator designated under section 5;

"conviction" ... means a conviction for an offence under this Act or under the *Tobacco Act* (Canada);

"director" means the director under section 1 of the *Tobacco Tax Act*; ...

[4] Section 2:

(2) A person must not sell ... tobacco to a person who has not reached the age specified by regulation under section 11(2)(g).

¹ R.S.B.C. 1996, Chap. 452.

² R.S.B.C. 1996, Chap. 451.

[5] Section 7:

- (1) A dealer is liable to have a certificate issued under section 9 if, within a 60 month period, the dealer has received, on or after September 1, 1995, two or more convictions respecting the same business location.
- (2) A certificate must be for
 - (a) a 6 month suspension of the authorization if there are 2 convictions respecting the business location,
 - (b) a 12 month suspension of the authorization if there are 3 convictions respecting the business location, and
 - (c) a 24 month suspension of the authorization if there are 4 or more convictions respecting the business location.
- (3) Subsection (2) applies even if
 - ...
 - (b) a previously given suspension at the business location is in force.
- (4) A suspension described in subsection (2)
 - (a) must be based on at least one conviction that was not counted for the purposes of a previous suspension described in subsection (2),
 - (b) must not be based solely on convictions that were counted for the purposes of a previous suspension described in subsection (2), and
 - (c) must not be based on a conviction that occurred before the earliest conviction on which a prior suspension was based.

[6] Section 9:

- (4) The administrator must issue or decide not to issue a certificate at the conclusion of a review and, if a certificate is issued, the administrator must send a copy of the certificate to the director and serve a copy on the dealer

[7] Section 10:

- (1) A dealer may appeal a certificate to the Supreme Court on an issue of law or mixed fact and law within 30 days of being served with a copy of the certificate

...

- (4) The Supreme Court must
 - (a) dismiss the appeal, or
 - (b) allow the appeal and order the director to terminate the suspension.

TOBACCO TAX ACT

[8] Section 1:

"**director**" means the person authorized by the minister to administer this Act ...

[9] Section 9:

- (1) ... on receiving a certificate from the administrator under the *Tobacco Sales Act*, the director must, if the person has a dealer's permit or authorization under section 44(2)(i) applicable to a location specified in the certificate,

- (a) suspend the permit or authorization for the location and period specified in the certificate ...

III

[10] Within that statutory framework, I find the following facts.

[11] On 19 June 2000, the appellant was convicted of selling tobacco to a person under the prescribed age, contrary to s. 2(2) of the **Tobacco Sales Act**. The date of the offence upon which that conviction was based was 23 July 1999.

[12] On 7 September 2001 two convictions for that same offence of selling tobacco to a person under the prescribed age were entered against the appellant. The dates of the offences for which those convictions were entered were 26 July 2000 and 12 January 2001.

[13] On 13 March 2002 the administrator of the **Tobacco Sales Act** wrote a letter to the appellant. The reference in that letter is as follows:

Re Notice of Intention to Consider Issuing a Certificate Advising the Director, *Tobacco Tax Act*, to Suspend Your Authorization to Sell Tobacco

[14] The letter recited the three convictions mentioned above, reproduced s. 7(2) of the **Tobacco Sales Act**, and alerted the

appellant to an intention to consider suspending the appellant's authorization to sell tobacco for 12 months. As well, the procedure required in the event the appellant elected to oppose the issuance of such a certificate was explained.

[15] By a memorandum dated 19 March 2002, the appellant advised the administrator of its - "wish to appeal/oppose the issuance of a certificate".

[16] The administrator received the appellant's memorandum on 25 March 2002. She was not persuaded. She decided to issue a certificate. She authored two letters on 6 May 2002: one to the Director, **Tobacco Tax Act**, the other, to the appellant. The letter to the Director recited the three convictions referred to above. The letters informed each of the proposed recipients of the administrator's decision. The reference in each letter was: "Re: Issuance of a Certificate ...". The letter to the appellant, and a copy of the letter to the director, were delivered to the appellant on 14 May 2002, at the Law Courts. Coincidentally, the appellant was at the Law Courts for the purposes of appearing at a trial, on a charge that it sold tobacco to a person under the prescribed age, on 23 August 2001. As a result of that trial, the appellant was

found guilty of the offence alleged. A conviction was entered 14 May 2002.

[17] Of this conviction of 14 May 2002, the appellant's representative, Mr. Oldfield, in an affidavit sworn 22 July 2003, and filed in this proceeding on 31 July 2003, said, among other things:

14. I knew that such convictions could be appealed however, I met with Aaron Severs of the Capital Regional Health District immediately following the hearing in a witness room in the Court House. Claire Avison of the Ministry of Health and Dianne Stevenson of the Capital Regional Health District attended the hearing but did not join Mr. Severs and I in the witness room.

15. At that meeting, Mr. Severs represented to me that it was their intention to order a 12 month suspension of the authorization to sell tobacco products because of the conviction record.

...

19. Since there was a Ministry of Health official in attendance when the fourth conviction occurred on May 16, 2002, I assumed that the fourth conviction was known to them and accounted for in the 12 month suspension.

20. No one ever mentioned anything to the contrary, or warned me that the May 14, 2002 conviction might increase the term of my suspension. Had they done so I would have immediately appealed the conviction.

21. As it was, I felt that the May 14, 2002 conviction had very little regulatory effect as I was only going to receive a one-year suspension.

22. Accordingly, I decided not to undergo the expense of retaining counsel to attempt to overturn the conviction ...

[18] By a letter dated 14 June 2002, to the appellant, the Director of the *Tobacco Tax Act*, in response to the administrator's letter of 6 May 2002, and pursuant to s. 9 of the *Tobacco Tax Act*, wrote, among other things:

Under section 9 of the *Tobacco Tax Act*, "on receiving a certificate from the administrator under the *Tobacco Sales Act*, the director must ... suspend the permit or authorization for the location and period specified in the certificate".

Under these circumstances, I must advise that I am suspending your authorization to sell tobacco products at 5295 WEST SAANICH ROAD, VICTORIA, B.C. V8X 4M6 at retail in the Province of British Columbia, effective June 26, 2002, for a period of 12 months ...

[19] The next event was some eight months later, in the new year. On 17 February 2003 the administrator wrote to the appellant. Again, the reference in the letter is:

Re Notice of Intention to Consider Issuing a Certificate Advising the Executive Director, *Tobacco Tax Act*, to Suspend Your Authorization to Sell Tobacco at 5295 West Saanich Road, Saanich, British Columbia.

[20] The administrator's letter of 17 February 2003 recited the three convictions set out in the letter of 13 March 2002,

and added, as a fourth conviction, the conviction of 14 May 2002.

[21] The administrator alerted the appellant to her intention:

... to consider issuing a Certificate advising the Director, *Tobacco Tax Act* that your authorization under the *Tobacco Tax Act* to sell tobacco ... is to be suspended for twenty-four (24) months because ... there have been four (4) convictions under the *Tobacco Sales Act*

[22] That notification precipitated activity by the appellant, namely an application on 2 April 2003 to extend the time for appealing the conviction of 14 May 2002. That application was not successful.

[23] On 21 May 2003, the administrator issued a certificate of suspension, and so advised the director and the appellant.

[24] On 16 June 2003 the director wrote to the appellant advising it that:

... I am suspending your authorization to sell tobacco products ... effective June 24, 2003, for a period of 24 months....

IV

[25] The appellant alleged two grounds of error in its appeal. First, it is said, the suspension of 16 June 2003 is contrary

to s. 7 of the *Tobacco Sales Act*. As I understand that ground, the argument is this.

[26] A 24 month suspension is applicable in the event of four convictions.

[27] The director knew that the appellant had been convicted four times before the suspension order of 14 June 2002.

[28] By delaying the suspension proceedings, on the fourth conviction, to June 2003, the director has effectively imposed a suspension period of 36 months, a period not authorized by the statute.

[29] To demonstrate the non-compliance with the statute, the appellant propounds a hypothetical example. That example is based on the following propositions.

[30] If a suspension is granted based upon the convictions of 19 June 2000, and only one of the convictions of 7 September 2001, then the statute prescribes a suspension of six months.

[31] If, near the end of the six month suspension, the convictions of 19 June 2000 and both of the convictions of 7 September 2001, are the grounds for a further suspension, then the statute prescribes a period of suspension of 12 months.

[32] If, near the end of the 12 month suspension period, the convictions of 19 June 2000, both convictions of 7 September 2001, and the conviction of 14 May 2002 are the grounds for a further suspension, then the statute prescribes a period of suspension of 24 months.

[33] This procedure yields a total period of suspension of 42 months for four convictions. The statute prescribes 24 months for four convictions. Therefore, the administrator's procedure is contrary to the statute.

[34] One of the implications of the appellant's position is that the administrator must calculate the number of convictions within a 60 month period and, having waited for that period to expire, invoke whichever of subsections (a), (b) or (c) of subsection (2) of s. 7 of the statute applies. That is an erroneous reading of the statute. The statute contemplates consecutive suspensions. Subsections (3)(b) and (4)(a), (b) and (c) of s. 7 of the statute, prescribe the very result complained of by the appellant in its example.

[35] Accordingly, the first ground of appeal does not succeed.

[36] The second error alleged by the appellant is that the delay in issuing the suspension of 16 June 2003 breached the principles of natural justice, resulting in the loss of

jurisdiction by the administrator, and the director, over the appellant.

[37] The first question raised by this ground of appeal is: what delay gives rise to a remedy? "Undue", "inordinate", "unreasonable" and "unacceptable" are some of the adjectives used to identify the passage of time involved. Those adjectives appear to be used interchangeably.

[38] The test in determining whether one of the adjectives applies to the "delay" is:

The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay and other circumstances of the case.³

[39] The "mechanical" nature of the administrator's task was identified in *380548 B.C. Ltd. v. B.C.*⁴ to reject an argument that the administrator erred in failing to consider a due diligence defence before issuing a certificate of suspension.

[40] The decision by the administrator to issue a certificate of suspension is not a complicated procedure. It appears to be simply the marshalling of information gathered by others.

³ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 122.

⁴ [1998] B.C.J. No. 637 (B.C.S.C.).

[41] The onus of reporting convictions lies on others than the administrator. Section 6(1) of the *Tobacco Sales Act*, prescribes:

- (1) A judge and every registrar, deputy registrar or clerk of any court must immediately send to the administrator a transcript, copy or record for each conviction made by the judge.
(My underlining.)

[42] The administrator need confirm the status of tickets issued under the *Tobacco Sales Act*, the identity and address of the owner and business, and the applicability of the convictions to a suspension. It is difficult to conceive of any procedure less elementary than that. A delay of nine months from the date the conviction was entered, to the date the administrator notified the dealer of an intention to consider issuing a certificate is an undue, inordinate, unreasonable and unacceptable delay.

[43] The second question raised by this ground of appeal is whether such a delay, "without more" is a necessary and sufficient condition for a loss of jurisdiction over the appellant? The answer to that question is "no". The rule was stated this way, in *Blencoe*:

... delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created

limitation period (citation omitted). In the administrative law context, there must be proof of significant prejudice which results from unacceptable delay.⁵

[44] As I understand the appellant's argument, the administrator's delay has prejudicially affected the appellant in two ways.

[45] First, the suspension of 16 June 2003 has imposed an additional 12 month prohibition on the sale of tobacco products, which will amount to a monetary loss of some \$36,000.

[46] The monetary loss is not a factor to take into consideration in this determination. That subject was thoroughly discussed in *380548 B.C. Ltd. v. British Columbia*⁶.

[47] The "additional" 12 month suspension appears to be based upon an interpretation of the statute which prevents consecutive suspensions. In my view, the statute presupposes consecutive, not concurrent, suspensions.

[48] Second, the administrator's delay, coupled with the appellant's "assumption" taken from discussions with the administrator's representative, denied the appellant the

⁵ *Blencoe*, above, at footnote 3, at para. 101. The notion is further discussed at para. 115 and paras. 120 and 121.

⁶ See footnote 4 above.

opportunity to take issue with the administrator's intention to issue a certificate.

[49] The argument is that if the appellant had known the administrator intended to exclude the conviction of 14 May 2002 from the certificate of 6 May 2002, an appeal would have been taken from the conviction of that date.

[50] There is a conflict between Mr. Oldfield's recollection and the recollection of the administrator's representative of the events which gave rise to the conviction of 14 May 2002. That conflict serves to take some of the force out of the appellant's argument. It would have been necessary for the appellant to have succeeded on its appeal from the 14 May 2002 conviction. Such a successful result is by no means clear.

[51] Further, Mr. Oldfield's assumption that the conviction of 14 May 2002 would be accounted for in the 12 month suspension was an unreasonable assumption in the circumstances. As a participant in a regulated market, the appellant knew, or ought to have known, of the consequences of convictions for non-compliance. The administrator's certificate of suspension of 6 May 2002 was in effect before the trial of 14 May 2002 commenced.

[52] In all of the circumstances the appellant has not persuaded me that the administrator's delay has caused a significant prejudice amounting to an abuse of process or, that the delay would, in the circumstances of this case, bring the suspension system into disrepute.

[53] Accordingly, the appeal is dismissed.

"R.D. Wilson, J."
The Honourable Mr. Justice R.D. Wilson